BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between AFSCME, COUNCIL 31, AFL-CIO and STATE OF ILLINOIS, CENTRAL MANAGEMENT SERVICES and DEPARTMENT OF CORRECTIONS	Arbitration Nos. 4345 and 4346 Gr. Nos. 62/63-0283-02 and 62/63-0284-02

Appearances:

Cornfield and Feldman, Attorneys at Law, by Mr. Jacob Pomeranz, 25 East Washington Street, Suite 1400, Chicago, Illinois 60602-1803, appearing on behalf of the Union.

Ms. Carol C. Kirbach, Labor Relations Counsel, Central Management Services, 503 Stratton Office Building, 401 South Spring Street, Springfield, Illinois 62706, appearing on behalf of the Employer.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, AFSCME, Council 31, AFL-CIO, hereinafter referred to as the Union, and State of Illinois, Central Management Services and Department of Corrections, hereinafter referred to as the State or Employer, the undersigned was selected to serve as arbitrator of the above grievances. Hearing was held on February 4, 2003, in Chicago, Illinois, at which time the parties presented such testimony, exhibits and other evidence as was relevant to the dispute. The parties made closing arguments instead of filing written briefs.

Now, having considered the evidence, the arguments of the parties, the contract and the record as a whole, the undersigned makes the following Award.

STIPULATED ISSUES:

Was the grievant, Wilbur Hollins, discharged for just cause effective June 14, 2002?

Was the grievant, Wahsieke Payne, discharged for just cause effective June 14, 2002?

If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISION:

ARTICLE IX

Discipline

Section 1. Definition

A. The Employer agrees with the tenets of progressive and corrective discipline. Disciplinary action or measures shall include only the following:

a) Oral reprimand (RC-10 excluded);
b) Written reprimand;
c) Suspension (notice to be given in writing); and
d) Discharge (notice to be given in writing).

Disciplinary action may be imposed upon an employee only for just cause. . . .

PERTINENT ADMINISTRATIVE DIRECTIVES:

01.02.115, II.E.

3. The card holder shall re-qualify with the firearm every twelve months. Failure to do so shall result in the revocation of the DCA 635.

40-HOUR PAROLE AGENT FIREARMS QUALIFICATION STANDARDS TRAINING MANUAL

Initial Training:
When an employee successfully completes the Board Certified training and weapons qualification, he or she shall receive a certificate of completion for the

> required curriculum. A Weapons Authorization Card, DC 635, shall be issued by the Training Academy and shall be forwarded to the appropriate Deputy Director for dissemination to the employee.
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> . . .
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> Newly hired Parole Agents will be given two attempts to qualify in a two-week period. If he/she fails to qualify, he/she will be terminated. Newly promoted Parole Agents will have two attempts to qualify in a two-week period. If he/she fails to qualify, he/she will be returned to the previous position held. Current Parole Agents and Supervisors will have three attempts to qualify in a two-week period. If he/she fails to qualify, he/she will be re-assigned to other positions within the Department.

FACTS:

The two grievants, Wilbur Hollins and Wahsieka Payne, were employed as parole agents in the Department of Corrections (DOC) prior to their discharge on June 14, 2002.

Prior to 2000, parole agents were designated either "field" or "office". Field agents worked in the field and were responsible for and performed the same duties as parole agents do now, while those designated office worked inside. Field agents were required to carry a handgun. They were required to successfully complete Board certified training and weapons qualification after which a Weapons Authorization Card, DCA 635, was issued. To meet the requirement and receive a DCA 635 card, field agents had to score 70% in a course consisting of 50 rounds to be fired at a target with a prescribed center of 8½ " x 14"; 24 rounds from 7 yards, 18 rounds from 15 yards and 8 rounds from 25 yards. Field agents had to requalify annually to maintain their DCA 635 card. To help field agents maintain their proficiency in weapons, they were required to attend quarterly training. However, those that failed to requalify were not discharged. They were provided remedial training or placed in another position.

In 2000, a parole initiative was implemented by the Director of DOC, requiring all parole agents to be weapons trained, i.e., possess a DCA 635 card. This was just a continuance of what was already required of "field" agents, but was a new requirement for office agents. Parole agents were given three attempts to qualify and those that failed were re-assigned to other positions within the department. However, once initially qualified, parole agents had to requalify annually to maintain their DCA 635 card and fulfill one of the requirements of the parole agent position. The qualification course of fire to qualify and requalify at all times relevant herein, is the same as the one used prior to the 2000 initiative.

On May 1, 2000, 40-Hour Parole Agent Firearms Qualification Standards Training became effective. The manual sets forth the firearm standards qualifications for initial training, but does not address annual requalifications. Jac Charlier, who at the time was a field parole agent and helped negotiate the standards qualification, testified that at the time of its negotiations requalification was not discussed. However, under A.D. 01.02.115, II.E.3 (Joint Exhibit 17), DCA 635 cardholders must requalify with the firearm every twelve months and failure to do so results in the revocation of the DCA 635. DOC applied the standards for initial qualification for requalification.

The requalifcation standard for parole agents is in contrast to the firearm standards of correctional officers.[1] A.D. 03.03.103 (Joint Exhibit 18) specifically addresses requalification and provides that any certified correctional officer who fails to requalify after three attempts will be required to attend an Academy firearms training for remedial training. (See A.D. 03.03.103, II.K.1.e.) Correctional officers are not terminated for failing to requalify.

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1 Correctional officers, while inside the institution, are not required to carry weapons, but must be certified in handgun, rifle and shotgun weapons if the need arises.

Grievant Wilbur Hollins began his employment with DOC in 1983 as a correctional officer. He was subsequently promoted to sergeant and served for a total of about 17 years as a correctional officer. On July 1, 2000, he was promoted to parole agent and, after successfully completing the required Academy training, was deemed Board certified and accordingly issued a DCA 635 card on August 21, 2000. He requalified on May 1, 2001 with a score of 86%. Hollins, in preparation of his April 2002 requalification, practiced in March. He failed his first requalification attempt on April 8, 2002; practiced on April 11, 2002 and scored 74%; failed his second attempt on April 12, 2002; practiced twice on April 15, 2002; and failed his third attempt on April 18, 2002.

Having failed his third attempt, the grievant was told to report to Carter, who is the Deputy Director of Parole (Northern Division). In discussing the grievant's situation, Carter told him that there was nothing in writing that stated that he would be fired. The grievant first became aware that failure to requalify would result in discharge after he failed his third attempt.

The grievant was charged with violating A.D. 01.02.115, Department Firearms Authorization, and Failure to Fulfill Job Responsibilities due to his inability to perform an essential function of his job. The grievant had an Employee Review Hearing on May 2, 2002 and had a third level grievance hearing on August 22, 2002. The grievant was placed on Suspension Pending Discharge on June 4, 2002 and was discharged on June 14, 2002. The Union filed a grievance on his behalf on July 14, 2002.

Hollins was an excellent employee. His evaluation for the period June 30, 2000 to January 16, 2002, which covered the period he was a parole agent, reflects that he "exceeded expectations" in all eight categories evaluated. (Joint Exhibit No. 2)

Grievant Payne began her employment with the State of Illinois in June 1999 in the Department of Human Services as a Mental Health Technician. On June 16, 2001 she was promoted to parole agent. On June 25, 2001, she successfully completed the Board certified training and weapons qualification and received her DCA 635 after her second attempt. Thereafter, she received no mandatory training until March 14, 2002 in preparation for requalification in April 2002. She failed her first attempt on April 11, 2002; she continued to practice on April 12; failed her second attempt on April 15; practiced on April 18 and passed, but failed her third attempt to requalify on April 19, 2002.

Payne at no time was told that failure to requalify would result in her discharge. Like grievant Hollins, Payne was charged with violating A.D. 01.02.115, Department Firearms Authorization, and Failure to Fulfill Job Responsibilities due to her inability to perform an essential function of her job. On May 2, 2002, she had an Employee Review Hearing and a third level grievance hearing on August 22, 2002. Payne was placed on Suspension Pending Discharge on June 6, 2002 and was discharged on June 14, 2002. The Union filed a grievance on her behalf on July 14, 2002.

On her June 16, 2001 – October 16, 2001 evaluation, the grievant was rated as "meets expectations" in all eight of the categories. (Joint Exhibit No. 15)

POSITION OF THE PARTIES:

State's Position

It is the State's position that it has the authority and right to require parole agents to qualify and carry a firearm in performing their duties. The parole agent position description

specifically states as a requirement, the ability to carry a firearm and possession of a Firearm Ownership Identification Card. This, it is argued, is a reasonable requirement given the nature of a parole agent's job, i.e., dealing with parolees.

Further, it is argued, that since parole agents, initially, are required to qualify for a DCA 635 card in order to work as a parole agent, it is reasonable that they must requalify annually and be Board certified to carry a weapon.

Here, it is argued, the required requalifying test was known by all and was equally applied to all. The grievants were treated the same as all parole agents. They simply did not meet the minimum standard score of 70%. They were provided practices which they participated in, but they nevertheless were not able to requalify. It is the State's position that because they did not requalify, they were not able to fulfill one of the requirements of the position, and, therefore, could not carry out the duties of the job. Because of same, the Employer had no choice but to terminate their employment.

With regard to the Union's argument that parole agents should not be treated differently than correctional officers who are provided remedial training, the State argues that the two situations are different. The State argues that correctional officers inside the institutions do not carry weapons. Also, they are required to qualify in the use of not only a handgun, but also a rifle and shotgun. For these reasons, they are sent back to the Academy for remedial training if they fail to requalify.

Lastly, the Employer contends that progressive or corrective discipline in this case is not warranted because the grievants were provided practices before their requalification attempts, but were still unsuccessful. The Employer argues that it is not up to the Arbitrator to determine the number of practices that should be provided.

Based on the above, the Employer argues that the instant grievances should be denied in their entirety.

Union's Position

The Union argues that the parties' collective bargaining agreement requires that discharges be for just cause and, further, that the tenets of progressive and corrective discipline be applied. Therefore, this is the standard that must be applied to the facts of this case.

It is the Union's position that there was no just cause for the discharge of the grievants, because they were never told that failure to requalify would result in discharge; that prior to the parole initiative, parole agents who worked in the field and required to carry a weapon were not discharged if they failed to qualify, but were sent back to the Academy or to another position; and that the requalification test is not closely related to the job. With regard to the latter, the Union argues that any likely use of a gun would be at close range, two – four feet, yet the test does not test this distance. Further, the Union argues, no parole agent has had to use his/her gun to date.

Here, the Union argues, the Employer requires requalification, but eliminated the quarterly training for budgetary reasons. The Union notes that while it was started again in March 2002, there was no training available in the entire year of 2001. It is argued that had quarterly training been provided the grievants would have undoubtedly passed.

The Union claims the parole agents should be treated the same as correctional officers and be provided remedial training if they fail to requalify. It is argued that it only makes sense that those who are required to carry a gun should be provided more training than those, like the

correctional officers, who do not. Further, the Union argues that any claim that the grievants should have practiced on their own is without merit because it is against regulations to use one's weapon outside of the department and Chicago prohibits the ownership of a gun.

The Union argues that the grievants are excellent employees who can perform their jobs and discharge for failing to requalify does not constitute just cause for discharge. It is argued that their deficiencies in requalifying can be corrected and, therefore, the Employer was obligated under the just cause standard and the contract to take corrective action, not discharge.

DISCUSSION:

It is undisputed that the grievants did not pass their requalification test to maintain their DC 635 weapons card and that this led to their discharge on June 14, 2002. It is also an established fact that parole agents in performing their duties are required to carry a firearm and that possession of a Firearm Ownership Identification Card (FOIC) is a stated requirement of the position. I agree with the Employer that, normally, an employee who cannot continue to meet a requirement or condition of the job, is subject to disciplines. However, each case must be decided on its own facts and the merits of each case must be decided applying the just cause standard of the parties' collective bargaining agreement. The contract (Section 9) requires that discharges be for just cause and that the principle of progressive and corrective discipline be applied.

To begin with, it is the right of management to establish the requirements of a position. Therefore, the decision to have parole agents carry a firearm is not a matter for determination by the Arbitrator. Thus, to hold the position one has to be weapons qualified. The fact that it is not required by law is really not determinative.

The Union makes the argument that while parole agents are initially required to be weapons qualified as spelled out in the 40-Hour Parole Agent Firearms Qualification Standards Training manual, there is no such requirement or even mention of annual requalification. This, the Union correctly points out, is in contrast to the correctional officers whose requalification requirement and procedures is specifically addressed in A.D. 03.03.103. However, the fact that requalification is not addressed, in the opinion of the Arbitrator, does not preclude the Employer from requiring annual requalification. It makes sense, and is entirely reasonable, that if an employee is required to carry a firearm that he/she annually be tested to determine if he/she continues to be qualified in his/her weapon.

The Union argues, however, that the requalification test itself was not reasonably related to the duties of a parole agent and, therefore, failure to pass the test is not grounds for a just cause discharge. The testing requirement (referred to as the qualification course of fire), adopted by DOC, of hitting an 8½ " x 14" target at 7, 15, and 25 yards, is the one established by the by Illinois Law Enforcement Training and Standards Board. (Joint Exhibit 20) The Union argues that if parole agents were to use their guns it would likely be at the 2-4 foot range and not the 7, 15 and 25-yard distances tested.

First, there is really no way of knowing at what range one might be required to fire if the situation arises. To say it is likely to be at 2-4 feet as opposed to 10, 15, or 25 feet is mere speculation; especially since those at the hearing could only recall one instance of a parole agent having to use a weapon in the line of duty.

Second, the qualification course of fire requires more rounds at a closer distance than at the farthest distance. (24 rounds at 7 yards, 18 at 15 yards and 8 rounds at 25 yards). To test at 2-4 feet range is really no test at all.

In summary, the test used by DOC is one that has been used a long time and one designed by experts. There simply is no record evidence that it is unreasonable as claimed by the Union.

Having concluded the above, the issue remains whether there was just cause for the grievants' discharge.

At the heart of this determination is whether the grievants should have been provided with further training before being discharged, and whether they were provided notice that failure to requalify would result in discharge.

With respect to the notice issue, it is clear from the record evidence that the grievants were not told, nor did they know, that failure to requalify would result in discharge. On the other hand, however, normally the position description itself with the requirement stated therein is sufficient notice.

However, in this case there are other facts that come into play.

In early 2000 when the parole initiative was implemented, there was no reason to believe that failure to qualify or requalify would result in discharge. The only policy, administrative directive, or written material addressing the matter was, and is, the 40-Hour Parole Agent Firearms Qualification Standards Training manual. The only provision for termination in the manual applies to newly hired parole agents. Newly promoted parole agents who fail to qualify are returned to their previous position held, and parole agents and supervisors at the time of the initiative who failed were reassigned to other positions within the Department. There is no reference in the manual to requalification nor was requalification discussed by Union and management representatives when the initial training requirements were adopted.

It is true, as argued by the Employer, that A.D. 01.02.115,II.E does require a DCA 635 card holder to requalify with the firearm every twelve months and that failure to do so shall result in revocation, but it does not provide that such failure results in discharge. Importantly, this A.D. was in effect prior to the 2000 initiative, but parole field agents who failed to requalify were not discharged. They were either given remedial training or another position. Thus, there was no reason to believe that anything had changed, in this regard, with respect to requalification. Of course, office agents had to now become qualified, but once they did they had no reason to believe they would be treated any differently than the field agents who continued on under the initiative.[2]

Apart from the notice issue, the Union correctly argues that the Employer has contractually agreed with the tenets of progressive and corrective discipline. Not all offenses, however, require attempts at corrective discipline. The seriousness of the offense dictates the degree of penalty. Some offenses are so serious immediate discharge is appropriate while other offenses may simply not be correctible. Arbitrator Whitley P. McCoy, in Huntington Chair Corp., 24 LA 490, 491 (1955), explained:

> Offenses are of two general classes: (1) those extremely serious offenses such as stealing, striking a foreman, persistent refusal to obey a legitimate order, etc., which usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline; (2) those less serious infractions of plant rules or of proper conduct such as tardiness, absence without permission, careless workmanship, insolence, etc., which call not for discharge for the first offense (and usually not even for the second or third offense) but for some milder penalty aimed at correction.

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2 The Arbitrator notes that Captain Polley, who was in charge of the Academy firearms training, testified that he was aware of five parole agents who failed to requalify. However, there is no evidence of any facts surrounding their cases; just that they did not requalify. There is no evidence what the consequences were.

Here, it should be noted that the grievants did not engage in any misconduct; rather they were unable to meet one of the requirements of the position they occupied. The Employer argues that they had no choice but to terminate their employment.

The question presented is whether there was any reason to believe that the grievants inability to requalify could be corrected and, if so, whether the Employer was obligated, under the just cause standard, to attempt corrective action instead of discharge. Here, it is apparent to the Arbitrator that the grievants' poor firearm performance was correctible because they had passed the same test once before and both passed the course of fire during practice just before the requalification test. Moreover, Hollins successfully requalified in weapons during his 17 years as a correctional officer.

But was the Employer obligated to attempt to correct or help the grievants qualify? Generally stated, requirements of a position such as licensures, certifications, etc., are conditions of employment employees have to meet to get hired or continue to be employed; in other words, they must remain qualified for the job.

It is the employee's responsibility to meet the conditions and, if not, he/she may rightfully be terminated since he/she is no longer able to perform the job.

The Employer cites two previous arbitration awards in support of its position that termination is just cause for discharge of an employee who fails to meet a condition of employment. The Arbitrator agrees with the decision in both cases, but finds them distinguishable on the facts.

In Arbitration Case No. 2432,[3] (Sheinin discharge) the contract, unlike the instant case, specifically provided for discharge of employees who could not "successfully complete the core test the second time". In that case the Union argued that discharge was not for just cause because the grievant had been told training would be provided. The Arbitrator, however, concluded "it is not clear. . .how additional instruction would have aided Sheinin in passing the test". (p. 19) That is not the case here.

In Arbitration Case No. 1832,[4] (Kent discharge) the grievant's discharge for not maintaining his pilot's certification was upheld. In so doing the Arbitrator considered the Union's request for a lesser penalty consistent with the corrective discipline provisions of the collective bargaining agreement, but concluded that additional corrective efforts ". . .will not somehow correct Kent's personal commitment to the safety requirements of an EMS helicopter pilot". (p. 26) The Arbitrator also concluded ". . .however, this conclusion does not alter DOA's obligation to provide continuing training to EMS pilots in order to maintain an IFR rating". (p. 26)

But here, unlike the above case, there is every reason to believe remedial training would be successful. Both Employer's witness Jac Charlier, and Union witness, Quincy Shelby, testified that as long as they could remember field agents were required to carry a firearm and requalify annually, but that those that failed requalification would not be discharged. Instead, they would be provided remedial training or placed in another position. Apparently, the remedial training was corrective and has been reinstated.

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3 State of Illinois, Department of Children and Family Services and Central Management Services and American Federation of State, County and Municipal Employees, Council 31, AFL-CIO, Yaeger (11/95).

4 State of Illinois and American Federation of State, County and Municipal Employees, AFL-CIO, McClimon (7/92).

Moreover, this is not a typical case of an employee failing to meet a qualifying condition or requirement of a position. Here, the Employer both before and after the grievants employment as parole agents provided mandatory quarterly firearm training in order to keep parole agents trained, and the only time it did not was during their tenure of employment. There was some confusion at the hearing regarding exactly when quarterly training was suspended and started again, but the best evidence establishes that it ended late 1999 or early 2000 and was reinstated in 2002.[5] Thus, neither grievant received quarterly training, or any other training, during their employment as parole agents until March 2002. It is very likely that had the grievants been provided quarterly training they would have successfully completed the required course of fire and requalified.

The Arbitrator points this out not for the purpose of finding that the Employer is obligated to provide quarterly training, but for the purpose of noting that the Employer, itself, obviously believed quarterly training was not only helpful, but necessary to keep parole agents qualified to carry a firearm. Employer witness Charlier and Union witness Shelby testified that said training was provided as long as they could remember and was only discontinued for budgetary reasons. The Arbitrator finds it hard to seriously question the value of the quarterly

5 The parties initially stipulated that quarterly training was offered in 2001, but as the record was developed the evidence establishes otherwise. The parties agreed that quarterly training when offered is mandatory. The record indicates that neither grievant received training in 2001, but did in March 2002. Therefore, the only reasonable conclusion is that mandatory quarterly training was not reinstated until 2002.

training to parole agents who might be called upon to use their weapon or to requalify. Even though parole agents are given three attempts to requalify and are allowed to practice before requalification, practices do not replace the value of quarterly training. This is apparent from the fact that agents were allowed to practice in preparation for requalification before, in addition to quarterly training. So practices are nothing new.

Again, this is not to say that the Employer must continue to provide quarterly training. It does, however, go to the just cause issue and whether the Employer should have taken corrective discipline prior to discharge. The Arbitrator believes that in this case it should have. This is so because the Employer's long-standing practice of providing quarterly training to parole agents, which was reinstated after a two-year hiatus, is acknowledgment of its importance in keeping parole agents trained and, therefore, better able to requalify. That being the case, there is every reason for the Arbitrator to conclude that absent the quarterly training for the grievants herein, remedial training would very likely enable them to requalify after having failed in their three attempts to do so. Obviously, there is value in on-going training, otherwise it would not have been reinstated in 2002.

Further, the value of remedial training is apparent from the State's requalification process as it relates to correctional officers. Correctional officers who fail to requalify after three attempts in a 90-day period are not discharged, but, instead, required to attend an Academy firearms program for remedial training. Again, the Arbitrator's purpose in pointing out the treatment of correctional officers is to show that there is every reason to believe that remedial training would result in corrective action and enable the grievants to requalify. The Employer argues that correctional officers are required to be trained in the use of a shotgun, rifle and handgun, instead of just a handgun, and this is why they are provided remedial training. The

Arbitrator does not find this distinction convincing. This might be persuasive in arguing for less training for parole agents than correctional officers, but is not persuasive where, here, the grievants received no on-going training at all. Therefore, remedial training would be as important for them as for correctional officers in achieving corrective results.

Based on the above, the Arbitrator concludes that the Employer's discharge of grievants Hollins and Payne was not consistent with the tenets of corrective discipline and the just cause standard, and, therefore, not for just cause.

REMEDY

To make the grievants whole, the Employer shall reinstate the grievants and require them to attend an Academy firearms program for remedial training. Since the parole agent position requires the carrying of a weapon and possession of a Firearm Ownership Identification Card the grievants must pass/requalify the course of firing to maintain their employment.

Based on the above facts and discussion thereon, the Arbitrator renders the following

AWARD

1. That the Employer did not have just cause to discharge the grievants Wilbur Hollins and Wahsieke Payne.

2. That the Employer shall make the grievants whole by reinstating them to their former position and requiring them to attend Academy remedial training for the purpose of requalifying for their DCA 635 card.

3. That if the grievants requalify after remedial training, the Employer shall make them whole for all lost wages and benefits due to their discharge.

4. That the Arbitrator will retain jurisdiction for a period of forty-five (45) days to resolve any issues that may arise over the interpretation and application of the remedy.

Dated at Madison, Wisconsin, this 25th day of February, 2003.

Herman Torosian, Arbitrator